FOUR SEAS ENTERPRISE CORPORATION SDN. BHD. *a*

v.

YAP YEAN CHEONG @ YAP KHENG HONG & 4 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ZAKARIA MOHD YATIM JCA *b*
[ORIGINATING SUMMONS NO. C31-200-86]
21 APRIL 1995

COMPANY LAW: *Rectification of register of members of company - Transfer of shares into transferee's name - Whether directors of company can refuse to register transferee's name - Whether powers in articles properly exercised - Delay in seeking relief from Court - Whether laches - Section 162 Companies Act 1965.* *c*

In consideration of the plaintiff lending a borrower the sum of RM7,000, the 1st, 2nd, 3rd and 4th defendants agreed to transfer to the plaintiff 10,050 shares held by them in the 5th defendant i.e. Selangor Omnibus Company Bhd. The said 1st to 4th defendants had executed a memorandum of transfer in escrow and deposited it with the plaintiff together with the requisite share certificate. The borrower did not repay the loan by 1 January 1980 and the plaintiff applied to Selangor Omnibus to register the shares. By letter dated 31 July 1980, Selangor Omnibus's directors declined to register the transfer without assigning any reason. *d* *e*

The plaintiff applied to Court to compel Selangor Omnibus to register the transfer and for rectification of the members. The plaintiff argued that the board of directors of Selangor Omnibus had failed to exercise its powers under the article of association in refusing to register the said shares. The defendants argued that since the action was brought almost six years since the Court's decision, the delay disentitled the plaintiff from the relief sought. Further the articles conferred an absolute discretion on the director to refuse registration. *f* *g*

Held:

[1] Since the originating summons was filed on 23 July 1986 and notice of intention to proceed given on 16 July 1990, the delay was a material consideration and amounted to laches. The plaintiff's application cannot succeed as the applicant is guilty of laches. *h*

[2] Article 30 of Selangor Omnibus provided that the directors may decline to register any transfer without assigning any reason therefor. It seems clear that the directors had absolute discretion to refuse to transfer the said shares to the plaintiff without assigning any reason. *i*

[3] Even though Selangor Omnibus was a public company which was not listed on the Stock Exchange, public companies too may impose restrictions on the right of transfer if the articles of association so provide.

[Plaintiff's application dismissed]

Cases referred to:
Len Chee Omnibus & Co. Ltd. In Re [1969] 2 MLJ 202 ***(foll)***
Central Securities (Holdings) Bhd. v. Haron bin Mohamed Zaid [1979] 2 MLJ 245 ***(foll)***
Kwality Textiles (Malaysia) Sdn. Bhd. v. Arunachalam & Ors. [1990] 3 MLJ 361 ***(foll)***
Mohan v. Sepang Omnibus Co. Sdn. Bhd. [19891 1 MLJ 247 ***(foll)***
Kesar Singh v. Sepang Omnibus Co. Ltd. [1964] 30 MLJ 122 ***(foll)***
Dublin North City Milling Co. Re [1909] IR 179 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 162

Other sources referred to:
Principles Of Company Law, Haj Ford, 5th Edn., p. 268, [1988] p. 303

For the plaintiff - JW Appukuttan; M/s. Wang Kuo Shing & Co.
For the defendants - Chang Mun Fong; M/s. Lim Kian Leong & Co.

JUDGMENT

Zakaria Mohd Yatim JCA:

In this application the plaintiff sought the order of the court in terms of the following prayers:

1. That the fifth defendant through its affairs do register the transfer of 10,050 shares in the fifth defendant now in the name of the first, second, third, and fourth defendants from the first, second, third and fourth defendants to the plaintiff.

2. That the Register of Members of the fifth defendant may be rectified by striking out the names of Yap Yean Cheong @ Yap Kheng Hong, Yap King Bin @ Yap Kheng Beng, Yap Kheng Lai and Yap Kheng Peng therefrom as the holder of 10,050 shares of the said fifth defendant held under Certificate No. 279 and by inserting in lieu thereof the name of the applicant as the holder of the said 10,050 shares;

3. Costs; and

4. For such other relief as this Honourable Court may deem just and proper.

The application was heard in chambers. After hearing the submissions of both counsel for the plaintiff and for the defendant, I dismissed the application with costs. On the application of the plaintiff, I adjourned the matter into Open Court for further argument.

The plaintiff's case is that, in consideration of the plaintiff lending to one Syarikat Lee Koon (the borrower) the sum of RM7,000, the first, second, third and fourth defendants had agreed to transfer to the plaintiff 10,050 shares held by them in the fifth defendant, the Selangor Omnibus Company Berhad (Selangor Omnibus). The first, second, third and fourth defendants had executed a memorandum of transfer in escrow and had deposited with the plaintiff the said memorandum together with the Share Certificate Number 279 for the said 10,050 shares. The borrower was to have repaid the loan by 1 January 1980. It failed to do so. The plaintiff then, applied in writing to Selangor Omnibus to have the memorandum of transfer of the 10,050 shares registered in its name. By a letter dated 31 July 1980, Selangor Omnibus informed the plaintiff that its directors had declined to register the said memorandum of transfer without assigning any reason. The said letter is reproduced below:

31st July 1980

The Manager
Four Seas Enterprise Corporation Sdn. Bhd.
Bangunan See Hoy Chan
8, Jalan Cecil
Kuala Lumpur.

Dear Sir,

Re: Share Certificate No. 279

We refer to your letter dated 4th July 1980 and would like to inform that the Directors had declined to register your proposed transfer.

Yours faithfully,

Sgd.
Managing Director.

The plaintiff contended that the board of directors, in refusing to register the said shares had failed to exercise its powers under the Articles of Association of Selangor Omnibus. The plaintiff also contended that the directors of Selangor Omnibus did not act in good faith in refusing to transfer the said shares. The plaintiff further contended that the act of refusing to register the transfer was *mala fide*.

Mr. Lee Kim Tee, in his affidavit in reply affirmed on 2 April 1991, on behalf of Selangor Omnibus, averred that the directors of Selangor Omnibus at the material time had resigned from the board and the present directors had no knowledge of what had transpired then. He could not trace the records of Selangor Omnibus at the material time. He could not locate the plaintiff's letter applying for the registration of the memorandum of transfer and other letters. He said that Article 30 of the Articles of Association gave the power to the directors to decline to register any transfer of shares without assigning any

reason. He denied that the directors had acted *mala fide.* He also averred that the plaintiff brought the present action almost six years after the plaintiff had become aware of the board's decision. Since there had been a delay in bringing the present action, the plaintiff was not entitled to the relief sought in the originating summons.

I shall deal with the question of delay first. Miss MF Chang, Counsel for Selangor Omnibus submitted that on 31 July 1980, the plaintiff was notified of the rejection of the transfer. The plaintiff filed the Originating Summons on 23 July 1986, and notice of intention to proceed on 16 July 1990. According to her there was a period of 10 years delay. She then cited *In Re Len Chee Omnibus & Co. Ltd.* [1969] 2 MLJ 202 and *Central Securities (Holdings) Bhd. v. Haron bin Mohamed Zaid* [1979] 2 MLJ 245.

Mr. Appukuttan, Counsel for the plaintiff sought to distinguish the two cases. He said that the two cases were not concerned with laches. There were other factors which the court had taken into consideration. He submitted that delay could not be held as a defence. He also said that the delay in the present case did not prejudice the defendants' case.

I shall now consider the two cases. In *Re Len Chee Omnibus,* Raja Azlan Shah J, as he then was, dismissed an application under s. 162 of the Companies Act on the ground that the applicant was guilty of laches. In that case the learned Judge found that the application was not filed within a reasonable time. There was a delay of four years. In *Central Securities (Holdings) Bhd. v. Haron* the issue was the rectification of the register under s. 162 of the Act. The Federal Court decided that the issue could not be decided in a summary proceeding under the section. The Federal Court also decided that delay in filing the application was a material consideration. In that case there was a delay of two years. Following the two cases cited above, I am of the view that the plaintiff's application cannot succeed on the ground that the applicant was guilty of laches.

I shall now turn to the relief sought by the plaintiff. Section 98 of the Act provides that a share is transferable in the manner provided by the Articles. Article 30 of the Articles of Association of Selangor Omnibus provided as follows:

> The Directors may decline to register any transfer of shares without assigning any reason therefor. They may also decline to register a transfer of any share on which the company has a lien.

In *Kwality Textiles (Malaysia) Sdn. Bhd. v. Arunachalam & Ors.* [1990] 3 MLJ 361. Article 44(1) of the Articles of Association of the company provided that the:

> directors may in their absolute discretion without assigning any reason refuse to register any transfer of shares to a person of whom they shall not approve ...

The Supreme Court held that the discretion given by the Article was by its language absolute. The Court should not interfere with the proper exercise of discretion by the board of directors to refuse registration for the well being of the company. Indeed, the Court should be slow to question the exercise of the discretion in the absence of evidence that the board of directors had acted *mala fide*.

The Supreme Court considered a number of authorities including *Mohan v. Sepang Omnibus Co. Sdn. Bhd.* [1989] 1 MLJ 247; *Kesar Singh v. Sepang Omnibus Co. Ltd.* [1964] 30 MLJ 122; and *Re Dublin North City Milling Co.* [1909] IR 179.

In *Mohan v. Sepang Omnibus*, Article 30 of the Articles of Association expressly provided that the directors had the "absolute" discretion to refuse to register any transfer of shares. In *Kesar Singh v. Sepang Omnibus Co. Ltd.*, Article 30 of the Article of Association also contained a similar provision. In *Re Dublin*, Article 26 of the Articles of Association did not contain the word "absolute". The article provided as follows:

> The directors, on behalf of the Company, may decline to register any transfer of shares not in the prescribed form, or whilst the member making the same is either alone or jointly with any other person indebted to the Company on any account whatsoever, or unless the transferee is approved of by the board. (Emphasis added)

The Master of the Rolls decided that the fact that the proposed transferee was already a shareholder did not entitle him to have the transfer registered as a matter of course; but it was discretionary with the directors to register the transfer to him or not. At p. 184, the Master of the Rolls said:

> I dislike mystery, but I think the law is wise in refusing to compel directors to disclose their reasons for accepting or declining a transfer. The directors have kept themselves within the rule, and the reasons operating on their minds are not disclosed, and I cannot speculate or guess as to what they were. There could not have been anything dishonourable, or anything approaching personal unfitness on the part of Spicer. But I am of opinion that the law allows the directors to hold their tongues. It allows them to say that everything was done honestly and *bona fide* in the interests of their company; and they have unanimously decided that it is not for the interest or advantage of the company that these shares should be transferred to Mr Spicer: and according to my view I have no power to make them say more.

The Supreme Court in *Kwality Textiles* had construed the discretion of the directors in *Re Dublin* as absolute discretion. At p. 362, the Supreme Court said:

> This construction is in fact supported by *Re Dublin North City Milling Co.* where it was held that where the directors are given absolute discretion to refuse to register any transfer of shares (as in Art 44(l) in the instant case), that Article is always construed so as to apply to every new proposal for a transfer of share and the fact that a transferee is already registered as a member makes no difference.

The words in Article 26 in *Re Dublin* and in Article 30 in the present case are similar except that under Article 30, the words "without assigning any reason" had been added. It seems clear, therefore, that under Article 30 the directors had absolute discretion to refuse to transfer the said shares to the plaintiff without assigning any reason.

Mr. Appukuttan said that the companies in *Kwality Textiles and Kesar Singh* were private companies. The two cases therefore did not apply to the present case as Selangor Omnibus was a public company. Miss Chang did not dispute that Selangor Omnibus was a public company but said that it was not listed in the Stock Exchange. In my opinion, public companies too may impose restrictions on the right of transfer if the articles of association so provide. See HAJ Ford, *Principles Of Company Law*, 5th Edn., p. 268; [1988] p. 303. Although Selangor Omnibus was a public company (but not listed in the Stock Exchange), I am of the view *Kwality Textiles, Kesar Singh Mohan v. Sepang Omnibus and ReDublin* apply to the present case.

In its affidavit in support of the originating summons, the plaintiff alleged that the directors of Selangor Omnibus had failed to act in good faith in refusing to approve the transfer. Mr Appukuttan told the court that he did not wish to proceed on the question of bad faith. In any event there was no evidence before this court that the directors had acted in bad faith. See *Kwality Textiles.*

For the reasons stated above, I confirm the decision I made in chambers. The plaintiff will pay the costs of further argument to the defendants.

Reported by L Nagarajan